



In the Matter of:

GREGORY C. SASSE,

ARB CASE NO. 99-053

COMPLAINANT,

ALJ CASE NO. 98-CAA-7

v.

DATE: August 31, 2000

**UNITED STATES DEPARTMENT
OF JUSTICE,**

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Todd E. Robins, Esq., *PEER, Washington, DC*

Joanne Royce, Esq., *Government Accountability Project, Washington, DC*

For the Amicus Curiae:

Christine A. Blazina, Esq., *Office of Assistant Secretary of Navy, Washington, DC*

For the Respondent:

Carol Catherman, Esq., Maureen Gilmore, Esq., *Department of Justice, Washington, DC*

DECISION AND ORDER

Gregory C. Sasse has filed a complaint alleging that his employer, Office of the United States Attorney, United States Department of Justice (DOJ), has violated the whistleblower protection provisions of the Clean Air Act (CAA), 42 U.S.C. §7622 (1994); the Solid Waste Disposal Act (SWDA), 42 U.S.C. §6971 (1994) and the Federal Water Pollution Control Act (FWPCA), 33 U.S.C. §1367 (1994)(collectively “the environmental statutes”). Specifically, Sasse asserts that “he has been subjected to an ongoing course of retaliatory discrimination by his DOJ supervisors because of his aggressive investigation and prosecution of environmental crimes, as well as his active promotion and participation in the Environmental Task Force.” Complainant’s Reply Brief at 2.

Procedural History

Before the Administrative Law Judge (ALJ), DOJ moved to dismiss Sasse's whistleblower complaint. DOJ argued that dismissal was appropriate based on two theories: (1) that the Labor Department lacked subject matter jurisdiction over Sasse's complaint, and (2) that Sasse had failed to state a cause of action.

The ALJ denied the DOJ's motion to dismiss. With regard to DOJ's subject matter jurisdiction argument, the ALJ found:

[T]he Respondents have not convinced me that the plain language of the statutes, the legislative history and/or Congressional intent mandates exclusion of this fact situation as protected activity. The language in the provisions is very broad and affords protection for participation in activity in furtherance of the statutory objectives and traditionally has been construed broadly. . . . The Complainant prosecutes violators of environmental laws which could lead to conviction, deterrence, and at the very least, heightened awareness of environmental laws by the accused violators. The task force is designed to facilitate inter-governmental cooperation to increase and improve such prosecutions. These activities would certainly qualify as commencing or causing to commence a proceeding or assisting or participating in any manner in such a proceeding or any other action to carry out the purposes of the environmental statutes at issue. Therefore, I find that the Complainant has alleged activity which is protected under the whistleblower provisions of the CAA, [SWDA] and [FWPCA].

Order Denying Respondent's Motion to Dismiss at 5. The ALJ also denied DOJ's motion to dismiss based on a failure to state a claim, stating that "the Respondent has not demonstrated that the complaint alleges facts which do not state a claim upon which relief can be granted, both as to the continuing violation theory and hostile environment claim." *Id.*

DOJ subsequently filed with the ALJ a "Request for Certification Pursuant to 28 U.S.C. §1292(b)," "asking that the issue of subject matter jurisdiction be certified as a controlling question of law so that Respondent may file an interlocutory appeal to the Administrative Review Board (ARB)." Order Granting Respondent's Request for Certification at 1. The ALJ granted the request, certified the question of subject matter jurisdiction to the ARB as an interlocutory appeal and stayed the proceedings at the ALJ level.

Discussion

The ARB generally disfavors interlocutory appeals resulting in piecemeal litigation of cases. *Amato v. Assured Transportation and Delivery, Inc.*, ALJ Case No. 98-TSC-6, ARB Case No. 98-167, slip op. at 2 (Jan. 31, 2000); *Hasan v. Commonwealth Edison Co.*, ALJ Case No. 99-ERA-17,

ARB Case No.99-097, slip op. at 2 (Sept. 16, 1999); *Allen v. EG &G Defense Materials, Inc.*, ALJ Case No. 97-SWD-8 & 10, ARB Case No. 98-073, slip op. at 2 (Sept. 28, 1998). DOJ urges the ARB to make an exception to its general rule in this case based on its claim that the Labor Department lacks jurisdiction over Sasse's complaint, arguing that

(a) the jurisdictional issue Respondent raises, i.e. whether a federal employee alleges protected whistleblower activity if he alleges nothing more than carrying out assigned federal duties relating to the enforcement of federal environmental law, is a controlling question of law as to which there is substantial ground for difference of opinion; and

(b) allowing an immediate appeal will materially advance the ultimate disposition of this action.

Petition for Review at 3. DOJ further asserts that "subject matter jurisdiction is a controlling issue. If it does not exist, it can never be inferred or waived. Any ruling made in the absence of subject matter jurisdiction is void ab initio and forever." *Id.* at 5. DOJ concludes, "The Administrative Review Board should grant respondent's interlocutory appeal and dismiss the complaint for failure to state **a cause of action**." Reply Brief Submitted by Respondent United States Department of Justice at 9 (emphasis supplied).

Although DOJ's declaration about the significance of subject matter jurisdiction is accurate as a general statement of the law, it is inapposite in this instance because DOJ has confused the Labor Department's subject matter jurisdiction over an environmental whistleblower complaint with the wholly separate question whether Sasse's actions might be covered as "protected activities" under the environmental statutes. *See Ramos v. Universal Dredging Corp.*, 653 F.2d 1353, 1355-1359 (9th Cir. 1981); *OFCCP v. Keebler Company*, ALJ Case No. 87-OFC-20, ARB Case No. 97-127, slip op. at 10 (Dec. 21, 1999). "A court is said to have jurisdiction, in the sense that its erroneous action is **voidable only, not void**, when the parties are properly before it, the proceeding is of a kind or class which the court is authorized to adjudicate, and the claim set forth in the paper writing invoking the court's action is not obviously frivolous." *West Coast Exploration Co. v. McKay*, 213 F.2d 582, 591 (D.C. Cir.), *cert. denied*, 347 U.S. 989 (1954)(emphasis supplied). Moreover,

[j]urisdiction . . . is not defeated as respondents seem to contend, by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover. For it is well settled that the failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction. Whether the complaint states a cause of action on which relief could be granted is a question of law and just as issues of fact it must be decided after and not before the court has assumed jurisdiction over the controversy. If the court does later exercise its jurisdiction to determine that the allegations in the complaint do not state a ground for relief, then dismissal of the case would be on the merits, not for want of jurisdiction.

Bell v. Hood, 327 U.S. 678, 682 (1946).

By filing a complaint alleging a violation of the whistleblower protection provisions of the environmental statutes, Sasse properly invoked the Department of Labor’s jurisdiction to adjudicate the complaint. While DOJ argues that “[t]he acts alleged by the complainant are not, under any reasoned interpretation of the statutes invoked here protected ‘whistleblowing’ activity,” Petition for Review at 5, it does not contend that Sasse’s arguments are frivolous or without color or merit. In fact, DOJ admitted that “[i]n certifying this matter for interlocutory appeal, Judge Tierney correctly found that ‘there is [*sic*] obviously substantial grounds for difference of opinion on the question of whether the Complainant has engaged in protected activity.’” *Id.* at 6. Thus, even if we should ultimately agree with DOJ that Sasse’s duties as an Assistant United States Attorney do not constitute protected activity under the environmental statutes, such finding would not divest the Department of Labor of jurisdiction to hear and decide the case.^{1/}

Conclusion

We **DENY** DOJ’s Petition for Review and **REMAND** the case to the ALJ to proceed with the adjudication of Sasse’s complaint.

SO ORDERED.

PAUL GREENBERG
Member

E. COOPER BROWN
Member

CYNTHIA L. ATTWOOD
Member

^{1/} DOJ cites *American Nuclear Resources v. United States Dept. of Labor*, 134 F.3d 1292 (6th Cir. 1998), in support of its argument that the ALJ’s finding that Sasse engaged in protected activity was overly broad. Significantly, while the Sixth Circuit in *American Nuclear Resources* rejected the Secretary of Labor’s finding that the complainant’s activity was protected under the whistleblower protection provision of the Energy Reorganization Act, 42 U.S.C. §5851, there is not the slightest suggestion in the court’s opinion that the Secretary did not have jurisdiction to make the finding in the first instance.